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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ARMOUR AND COMPANY, an Illinois Corporation,
Petitioner,

vs.

CHESTER BOWLES, Price Administrator,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Armour and Company, an Illinois corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in the above-entitled cause on March 29, 1945.

Opinion Below

The opinion of the Emergency Court, not yet reported, appears in the printed record, pp. 441-459.

Statute Involved

The statute involved is the Emergency Price Control Act of 1942 as amended (50 App. U. S. C., Secs. 902, 923, 924, 963), the pertinent provisions of which are printed in the appendix to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942 (50 App. U. S. C., Sec. 924(d)) and Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347).

Statement

This case arose out of the protest of Armour and Company filed February 8, 1943 against Revised Maximum Price Regulation 169, which fixed the ceiling prices of beef and veal carcasses and wholesale cuts, and was issued by the Administrator of the Office of Price Administration on December 10, 1942. After a denial of the protest on October 27, 1943, a complaint by Armour and Company to the United States Emergency Court of Appeals was filed November 26, 1943. The court on January 10, 1944 granted an application by complainant for leave to introduce additional evidence. The protest proceedings were reopened, additional evidence received, and on June 21, 1944 the Administrator issued an order denying the protest upon reconsideration. An amended complaint was filed in the Emergency Court by Armour and Company; and at the hearing both complainant and respondent were permitted to introduce certain additional evidence directly to the court.

On March 29, 1945, the Emergency Court handed down its opinion and entered a judgment dismissing the com-

plaint and sustaining the maximum price fixed for beef, on the following grounds:

1. That returns from "cattle operations as an entirety"[1] covered "out-of-pocket costs" of the products of all such operations ("out-of-pocket costs" being defined to *include* direct labor and material costs and to *exclude* administrative and selling expenses), and that therefore the maximum price for beef met the statutory standards of being "generally fair and equitable" and "allowning a generally fair and equitable margin for * * * processing."

2. That the long-established accounting method used by the industry for determining the cost of beef "is not an acceptable yardstick for determining whether the regulation establishes generally fair and equitable maximum prices."

3. That the fixing of different maximum prices for beef for processing slaughterers and non-processing slaughterers[2] (with similar costs of production), through the device of special subsidies to non-processing slaughterers, is not an unlawful discrimination which would invalidate the maximum price regulation.

There is substantially no dispute over facts in the present case. The issues arise over (1) interpretation of the statutory standards for price-fixing laid down in the Emergency Price Control Act of 1942 and subsequent amendments thereto; (2) the proper accounting methods to determine costs of production; (3) the legality of a maximum price

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[1] These operations included, in addition to beef production, the production of all commodities resulting from processing the by-products of cattle slaughter, such as leather, soap, etc.

[2] Processing slaughterers are those who sell beef and process cattle by-products. Non-processing slaughterers are those who sell beef and sell raw cattle by-products.

which requires all producers of a commodity to sell that single commodity at a loss; (4) the legality of a maximum price which has to be supported by a subsidy to single-product producers (because they could not continue to produce at a loss), but which is not supported by an equal subsidy to multi-product producers (on the ground that their profits from the production of other commodities will permit them to continue production); and (5) the legality of using the composite returns from the sale of all products related to cattle slaughter to determine whether the prices established for beef are "generally fair and equitable" and allow "a generally fair and equitable margin for * * * processing."

The protest and complaint of Armour and Company against Rev. Max. Price Regulation 169 were based upon, and supported by, evidence that, using the established "cut-out" Test Method of cost accounting, the Administrator's own figures showed an average loss for the industry under Rev. Max. Price Regulation 169, December, 1942, through July, 1943, as follows:

Grade AA carcass beef loss	$1.835 per cwt.
Grade A carcass beef loss	$2.106 per cwt.

(R. 242-251)

Comparable losses for these and all other grades have continued to date.

Using the same cut-out Test Method, Armour and Company showed losses in its Beef Division for the fiscal years 1942, 1943, and the first ten months of 1944, as follows:

1942—Beef Division loss (Cut-Out Test)—$3,244,000
1943—Beef Division loss (Cut-Out Test)—$9,811,000
10 months
1944—Beef Division loss (Cut-Out Test)—$7,482,000

(R. 124)

The cut-out Test Method is admittedly the long-established method of computing beef costs. According to an authoritative writer quoted in the opinion of the court: (R. 451) "This is the accepted method of computing the cost of a dressed carcass; and it is the method that the packer must follow if he is to conduct his business intelligently."[3]

The Administrator refused to accept the cut-out Test Method of cost accounting despite specific requirements of the Emergency Price Control Act of 1942 as amended. The original Act provided, in Section 2(h), as follows:

> "The powers granted in this Section shall not be used or made to operate to compel changes in business practices, *cost practices or methods*, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act." (Italics ours.)

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[3] The following authoritative description of the cut-out Test Method is quoted in the court's opinion (R. 450):

> "To explain the packer's cost-finding methods more fully take the problem of the butcher who buys a steer weighing 1,000 pounds alive, for which he pays $100.00. When he has slaughtered and dressed it, he will have a dressed carcass of beef weighing about 500 pounds, a hide, some fats, a tongue, a heart, a liver, and many other by-products. How will he figure costs?
>
> "He knows that he can sell the hide for, say $20.00; the fats for $3.00; and the other by-products for $2.00—a total of $25.00 worth of by-products. He knows also that the slaughtering and dressing has cost him, say, $5.00. Naturally he will figure the dressed cost of the carcass of beef in this manner:
>
> | | |
> |---|---|
> | "Paid for live steer weighing 1,000 lbs. | $100.00 |
> | Expense of slaughter and dressing | 5.00 |
> | Total cost of dressed beef and by-products | $105.00 |
> | Can sell by-products to net | 25.00 |
> | Balance, cost of 500 lbs. of dressed beef | $80.00 |
>
> or an average of 16 cents per pound."

The Stabilization Extension Act of 1944 amended the foregoing provision by prohibiting changes in established practices, except where such action was affirmatively found by the Administrator to be necessary to prevent evasion, and then strengthened this provision most significantly by adding a proviso in Section 2(a) (which authorizes price-fixing), this proviso reading as follows:

> "Provided, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods."

The Administrator contended, however, that the cut-out Test Method showed merely "bookkeeping losses," although it was admitted that credits for by-products were deducted from beef costs at the amount of the market value or ceiling price of the unprocessed by-products.

The Administrator refused to accept the "cut-out" Test Method of cost accounting primarily on the ground that it did not fully take into consideration results obtained from the processing of by-products. But the evidence presented by Armour and Company, in conformity with what was termed the "OPA Method" of cost accounting, showed that after the transfer of proportionate profits to the Beef Division from all operations utilizing by-products (pharmaceuticals, soap, leather, glue, sausage, canned meat, etc.), the Beef Division still suffered heavy losses by reason of inadequate ceiling prices for beef (R. 120).

Thus the Administrator was forced to return to an early position (rejected in an earlier hearing by the Emergency Court) that if the over-all profits of Armour and Company were equal to, or exceeded, average peacetime earnings (period, 1936-1939), Armour and Company could be required to sell beef below cost of production. He thus fell back, in the language of the court, "on the primary test of over-all profits, which indiscriminately includes not only

the profits of the industry attributed to cattle operations but also an important part of the industry's profits not in any way attributable to the domestic slaughter of cattle" (R. 456).

The court rejected this over-all profits test, pointing out that if accepted "there would be no legal limitation to the extent to which the Administrator could depress prices of a given commodity so long as the industry as a whole maintained its base period earnings" (R. 456).

The court rejected the cut-out Test Method of cost accounting advocated by Armour and Company, and also the over-all profits test advocated by the Administrator, and extended a dual test first announced in *Gillespie-Rogers-Pyatt Co., Inc., et al.* v. *Bowles,* 144 F. (2d) 361 (1944) (R. 454). In that case, the issue was as to whether maximum prices previously accepted had become unfair and inequitable; and the court laid down the standard of price-fixing for a multi-product industry as follows:

First, are the industry earnings under price regulation equal to normal peacetime earnings or better? If earnings are subnormal, price increases may be required. Second, if price increases are not required by subnormal earnings, an increase may be required for an individual product if the current maximum price fails to cover out-of-pocket costs (assuming that it has not been the industry's practice to sell such a product below cost).

But the court extended the doctrine of the Gillespie case and held that the single-product standard should be applied to "cattle operations as an entirety, treated either as a single product or as a closely related group of products." So the court rejected the cut-out Test Method of determining the cost of production of carcass beef as a single product and tested the fairness of the ceiling price for beef by the results of Beef Division operations as a whole, crediting against losses from the sale of beef all the profits of operations utilizing by-products of cattle slaughter. But

even these computations would have failed to sustain the fairness of ceiling prices for beef without the use by the court of an extraordinary standard not authorized in any way by the Emergency Price Control Act, that is, the standard of "out-of-pocket costs" (R. 454-458).

In a word, the court sustained a maximum price for beef which did not return costs of production according to any accepted method of accounting, and which of course provided no compensation for an enormous investment in the plant, although if a producer were occupying a *leased* building he would certainly find it necessary to pay his rent! But in order to sustain the court's conclusion, it was necessary for the court to eliminate a very large item of cost which has to be recouped in the selling price of a product. The court eliminated administrative and selling expenses and established a definition of "out-of-pocket costs" without warrant in the statute, in sound accounting, or in common sense. (R. 457.)

On the same day on which the Emergency Court dismissed the complaint of Armour and Company, it entered a judgment setting aside Rev. Max Price Regulation 169 in so far as the maximum prices therein for beef carcasses and wholesale cuts were made applicable to non-processing slaughters. (*Heinz, et al.* v. *Bowles*—Decided March 29, 1945.) In its opinion, the court found specifically that slaughterers who simply sold beef and by-products (without processing the by-products) could not realize enough on the sale of beef at the established maximum prices to cover their costs, *even though such non-processing slaughters have been given a special additional subsidy of 80¢ per cwt.* above what is allowed to the processing slaughterers such as Armour and Company. Nevertheless, the court held:

"The non-processing slaughterers as a group on the Administrator's own computation have been afforded no

margin for profitable operation. Indeed consistent losses are indicated."[4] Thus the court sustained as a lawful price regulation the fixing of different maximum prices for different producers of precisely the same commodity, not on the basis of a difference in costs of production but on the basis that one producer is making money out of the production of *other* products, so he can afford the loss, whereas the single-product producer must go bankrupt. Petitioner submits that this is (1) a discrimination not authorized in the federal statutes, and (2) a discrimination which could not be constitutionally authorized.

The Questions Presented

The following principal questions are presented:

1. On the admitted facts of record, does Rev. Max. Price Regulation 169 comply with the statutory requirements of a "generally fair and equitable" price (Section 2 (a), Emergency Price Control Act of 1942) and a "generally fair and equitable margin" for processing (Stabilization Act of 1942)?

2. If it be lawful to fix the maximum price for a single product of a multi-product industry at an amount that only covers "out-of-pocket costs," can "out-of-pocket costs" be legally defined to include only labor and material costs and to exclude general overhead, administrative, and selling expenses?

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[4] The cost of production for non-processing slaughterers were determined by all parties by using the cut-out Test Method (rejected by the court and Administrator for Armour), and in the costs, administrative and selling expenses were included (which were rejected by the court and Administrator for Armour).

The Administrator stated: "The cut-out test, which is irrelevant for the industry generally, is an adequate basis for testing the position of the non-processing slaughterers, since their actual realization from cattle is derived solely from the sale of the carcass and unprocessed by-products" (R. 309).

3. Can different miximum prices be lawfully fixed for the same commodity so as to provide profitable prices for some producers while at the same time requiring other producers, with similar production costs, to sell the commodity at a loss?

4. Is Revised Maximum Price Regulation 169, as sustained by the court, an invalid regulation of the maximum prices for beef carcasses and wholesale cuts as being not in accordance with law, arbitrary and capricious, and a violation of the constitutional rights of petitioner under the Fifth Amendment?

The following subsidiary questions are presented:

1. Can a multi-product producer be required to change cost accounting practices and methods, in view of the requirements of Section 2(h) of the Emergency Price Control Act of 1942?

2. Can the Administrator fix prices on a basis that requires the determination of costs otherwise than in accordance with established accounting methods, in view of the amendment to Section 2(a) of the Emergency Price Control Act of 1942 by the Stabilization Extension Act of 1944?

Reasons for Granting the Writ

1. The decision of the United States Emergency Court of Appeals in this case involves a construction of the Emergency Price Control Act of 1942 and an interpretation of the statutory requirements for fixing maximum prices for commodities under the authority granted in that Act, which is a pioneer decision of far-reaching consequence to producers and consumers of vitally essential products. The principles laid down by the court will determine the bases for fixing prices not only of the meat supplies of the nation, but also the prices of numerous essential commodities which are produced by multi-product industries.

2. The decision permits the Price Administrator to set up his own cost accounting methods, regardless of established accounting methods, which procedure, in effect, requires the determination of costs by novel methods and compels changes in business practices and methods, in complete disregard of the specific provisions of the Emergency Price Control Act of 1942 as amended.

3. The decision of the court sustains a discrimination as to prices between producers of the same commodity by including subsidies as an economic factor in price regulation and approving differential subsidies based not on different costs of production, but based solely on the fact that some producers make additional profits out of the production of other commodities which are charged off against losses through the production of under-priced commodities.

We submit that there is no warrant in the law for requiring a person engaged in several businesses to subsidize the losses of one by the profits of others, while at the same time providing a public subsidy for a person engaged only in the one, losing business. As a method of taxing profits, such a procedure violates the constitutional limitations regarding taxation defined in Article I, Sec. 2 and Sec. 7, and the Sixteenth Amendment. As the appropriation of the earnings of a person to public uses or for the benefit of others by executive order, it violates the Fifth Amendment. As an arbitrary discrimination and a denial of equal protection of the laws, it violates also the Fifth Amendment.

4. The United States Emergency Court of Appeals has decided, we believe erroneously, questions of great public importance seriously affecting the welfare of the people of the United States, impeding the production of food essentialy normally to the well-being of the people, and peculiarly important in this time of war.

5. Under the Emergency Price Control Act, the power of judicial review of the administration of the Act is vested exclusively in the Emergency Court of Appeals, whose judgment is subject only to review through a petition for a writ of certiorari to the Supreme Court, thereby imposing a peculiar responsibility upon the Supreme Court to exercise its discretion to grant a review of such a case of first impression and far-reaching public importance as is here presented.

WHEREFORE, the petitioners pray that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in this case March 29, 1945.

Dated: April 28, 1945.

Respectfully submitted,

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